Court of Appeals of New York.

MILLS *et al.* Appellants *v.* PARKHURST, as Assignee, &c., *et al.* Respondents.

The doctrine of election between inconsistent remedies does not apply to creditors who first assail an assignment for the benefit of creditors on the ground of fraud, and, pending this action, or after its unsuccessful termination, claim a dividend from the assigned estate.

A creditor may first test the validity of an assignment for the benefit of creditors, and then make claim for his proportion of the assets after the assignment is sustained.

In January, 1884, Henry W. Perine was a member of the firm of Perine & Co., of New York City, and also of the firm of H. W. Perine & Co., of Bath, N. Y. On the twenty-seventh of that month, the New York firm made an assignment for the benefit of its creditors, and Henry W. Perine, upon ascertaining the insolvency of the New York firm, purchased the interests of his partners in the Bath firm, with agreement to assume and pay the latter firm's indebtedness. On the thirtieth of January, Henry W. Perine made an individual assignment for the benefit of certain preferred creditors, and then for his individual creditors and the creditors of his New York firm. Reuben O. Smith, an individual creditor, reduced his claim to judgment after the assignment, and commenced a proceeding to have the assignment declared void, by reason of the execution of certain prior mortgages and of the direction in the assignment to pay individual creditors and the New York firm's creditors with preference of the former: *Smith* v. *Perine* (1888), 1 N. Y. Supp. 495. Only the latter ground is erroneously stated by VAN BRUNT, P. J., in *Mills et al.* v. *Parkhurst et al.* (1890), 9 N. Y. Supp. 109. This suit was a failure in the lower courts, as was the case on appeal, where only the former ground was argued: *Smith* v. *Perine et al.* (1890), 121 N. Y. 376 and per RUGER, C. J., page 381.

In February, 1886, while this adversary action was pending, Philo S. Mills and other creditors of Henry W. Perine began an action for an accounting of the assigned estate,

and a referee was appointed to state the account. Smith proved his claim, before the referee, but with notice that he did not waive any rights exercised in bringing the adversary proceeding, and that his proof of claim was intended to protect his interest in the fund and to prevent final distribution until the decision of his appeal. On exceptions to the report of the referee, the allowance of Smith's claim was held to be erroneous: per O'BRIEN, J., in Special Term of the Supreme Court for New York County (1889), 5 N. Y. Supp. 730, 731; and VAN BRUNT, P. J., in General Term (1890), 9 N. Y. Supp. 109. The former put the point thus:

> No citation of authority is necessary in support of the well-settled proposition of law, that a creditor who proves his claim under an assignment, and accepts a benefit under it, elects thereby to ratify the assignment, and can never afterwards be heard to attack it, or maintain an action to set it aside. Is the converse of this proposition good? Will a party who elects not to accept and ratify the assignment, but repudiates it, and maintains an action to set it aside, be held to have made his election, and be precluded from claiming any benefit thereunder?
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> It is asserted that the reason for the rule in the converse falls, for it is urged that in the one case the creditor is forbidden to attack an assignment which he has already ratified and confirmed, and under which he has laid claim to certain rights; in the other, he is asking for that portion of his claim which his creditor, in the instrument of assignment, has declared himself willing to pay, while seeking to determine whether or not he be in law entitled to more.

The same learned Judge briefly reviewed *Jewett* v. *Woodward* and *Sternfeld* v. *Simonson* (*infra*, pages 354, 356), and erroneously, according to the Court of Appeals (*infra*, page 342) concluded, that:

> While, therefore, the rule as to election, as applicable to voluntary assignments for the benefit of creditors, is not as sweeping as with respect to other instruments, as, for example, claims under a contract, as in *Moller* v. *Tuska* (1881), 87 N. Y. 166, where the Court laid down the broad rule that if a man once determined his election, it shall be determined forever, nevertheless, in the absence of any express authority to the contrary, I am inclined to think that on reason and principle the doctrine of election should be applied to a case like this, so as to prevent a creditor from holding at the same time two inconsistent positions, one in maintaining an action to destroy an instrument which in another action he seeks to uphold. This is trying to repudiate and ratify at the same time. Moreover, his hostile action compelled the expenditure of moneys, pre-

vented the distribution of the estate for a long time, jeopardized the interests of all the other creditors claiming under the assignment, and, while he could, when presenting his claims, by abandoning his appeal, have had them allowed, he should be held to his election as standing in hostility to the assignment, and the exception to the allowance of these claims should be sustained: O'BRIEN, J., 5 N. Y. Supp. 732-3.

Benjamin S. Harmon, for appellants.

Humphrey McMaster, for respondents.

GRAY, J., March 20, 1891. The first of the two questions which were presented, relates to the right of the appellants to come in and share in the distribution of the assigned estate, and the argument against their right is, that in bringing and prosecuting the action to set aside the assignment as fraudulent, they had thereby elected to repudiate the assignment.

The doctrine of election, which has been thus far successfully invoked in support of the argument, does not seem to be applicable to such a case, and no authority is found warranting its application. The learned Justices who considered the question at the Special and General Terms, were influenced in their conclusions by the supposition that these appellants were pursuing two remedies upon their claims against their debtor, Perine, and that though direct authority might be wanting upon precisely such a case, yet analogy with adjudged cases, which hold that inconsistent remedies may not be availed of, or concurrently pursued, required the application of the doctrine of election in this instance. If the definition of the legal position taken by these appellants was correctly assumed below, we should have nothing to say, and could not add to their opinion. But we cannot agree with them in their view of the situation of the parties. The elements required to make out a case of election were wanting. The doctrine of election, usually predicated of inconsistent remedies, consists in holding the party, to whom several courses were open for obtaining relief, to his first election; where subsequently he attempts to avail himself of some further and other remedy not consistent with, but con-

tradictory of, his previous attitude and action upon his claim. The basis for the application of the doctrine is in the proposition that where there is, by law or by contract, a choice between two remedies, which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the prosecution of the other. An extended citation of authorities illustrating the principle, in cases of breaches of contract, or of a duty imposed by the law, would be unprofitable here, because of many recent decisions of this Court, and because not needed in the present discussion. Where parties are under some contract, or the case is one of a deed or of a will, an election is deemed to be made where there has been an acceptance of a benefit, under the one or the other, and the party benefited will not be heard to raise the question of validity, nor to insist upon some other but inconsistent legal rights, however well founded. So it is conceivable that the rule may be so extended as to apply to the case where a creditor comes in under an assignment by his debtor for the benefit of creditors, in such way and with such attitude as should preclude him from thereafter assailing its validity. But how can the converse of the proposition be sustained? The assignment by an insolvent debtor is involuntary as to creditors in the application of his assets to their claims and, it may be, unequal as well as unjust as to some, and it is of no effect if fraudulently made, within the meaning of the law. Shall the creditor, for endeavoring to set it aside on legal grounds, if unsuccessful, be held incapable of receiving his share of the debtor's assets? Such a rule could not be based upon equitable principles. It would come so near to lending aid and encouragement to attempts at fraudulent assignments, as to render its adoption impossible.

The assignment is not like a gift of property upon conditions open to the acceptance or rejection of the donee. It is a payment by the assignor of his debts after his own plan. The deed of assignment is in no sense a contract between the debtor and his creditors, and it does not depend for its validity in law upon their assent. It is a means or mode which

the statute permits to be adopted by an insolvent debtor for the distribution of his estate among his creditors, and so long a he has acted without fraud, in fact or in law, and has complied with the prescriptions of the act, his conveyance to an assignee, for the purpose stated therein, will stand and be effective. If the distribution is to be made unequally among the creditors, and some are preferred to others in payment, the assignment is not viewed by the Courts with any favor, and is only tolerated and upheld when all conditions are met for the prevention of fraud: *Nichols* v. *McEwen*, 1858, 17 N. Y. 22. The debtor's proceeding sets at naught whatever elements of superiority the non-preferred creditor's claim may possess, as it may nullify the results of any diligent effort on his part to secure his debt. It compels him to submit to inequality in payment and to take his *pro rata* share of the estate, unless he discovers and can establish its invalidity. But, if he believes himself possessed of proof invalidating the assignment, he is not debarred from attacking it and endeavoring to set it aside. He is then but insisting upon his general right to be paid his judgment in the order of its priority; and on what principle should his endeavor in that direction prevent him from proving and establishing his right, in any event, to his share in the assigned estate, which the assignee must be deemed to be holding in trust for him and all other creditors under the debtor's deed? The creditor may not feel any more hostility to the debtor's proposed distribution of his estate, when he sues to annul it, than he did before. The bringing of the suit is merely the hostility on his part pronounced in legal proceedings. The learned Justice delivering the opinion at the General Term conceded that where an action to set aside the assignment had been brought, and was unsuccessful and terminated, an election would not be held to have taken place [*supra*, page 341]. How does the mere pendency of the action affect and change the situation? What is the attitude of the parties? The debtor has transferred his estate to another upon the trust that he distribute it, in the manner provided in the deed, to and among his creditors. The assignee is a trustee, whose

duty it is to make that distribution. A creditor's only alternative, if he is not contented to take what would thus come to him, is to endeavor to set aside the deed of assignment, if he deems himself possessed of the requisite evidence of its invalidity at law. If there is any election for him to make, it can only be with respect to what remedies may be available to him in order to right himself upon his judgment against the assignor and to avoid the assignment.

We think, therefore, that this was not a case of election of remedies; and that, in endeavoring to set aside the deed of assignment in order to render their judgments effective, the appellants were testing and contesting the legality and validity of their debtor's act and disputing its binding force upon them, as they had a legal right to do, and which was a course that recognized the debtor's deed, but alleged the existence of grounds for holding it voidable and therefore not compulsory upon the creditor. It in no wise militated against the right of the appellants, if defeated upon that issue, to share in the assigned estate on the basis of distribution provided in the debtor's deed to his assignee.

The second question argued was whether the appellants, if entitled to share in the distribution of the assigned estate, could claim preference in payment under the assignment, as being individual creditors of Perine. With respect to that question, we agree with the decision of the Court below denying that right. The indebtedness represented by their claims was clearly excepted by the terms of the deed of assignment, and they could only claim to share ratably with other creditors after the payments previously directed.

So much of the judgment appealed from as affirmed the judgment disallowing the right of these appellants to share in the distribution of the funds in the assignor's hands should be reversed and these appellants adjudged entitled to share with other creditors not preferred in the assignment.

Costs to the appellants, to be paid out of the estate in the assignee's hands.

All concur.

Hostility to an assignment may be manifested either before or after assent to the provisions of the trust created for the creditors, and it will be observed that this recent New York case involves only the former class of hostile creditors. There seems little doubt of the conclusiveness of assent to an assignment upon any future hostility. Unfortunately, this conclusiveness has been placed on the ground of election, as in *Frierson, Exr., et al.* v. *Branch, Exr.* (1875), 30 Ark. 453, 457; *Adlum* v. *Yard* (1829), 1 Rawle (Pa.) 163, though in case of testamentary dispositions, no person will "be compelled to elect, unless *his* property is attempted to be disposed of by the testator": Bisph. Eq. § 302.

Hostility before assent, does not, in every forum, prevent abandonment of that hostility and subsequent assent to the provisions of the debtor's assignment for his creditors. Before discussing this difference between prior and subsequent hostility, it will be advisable to examine the cases, and the ostensible principles upon which they have been decided. It will also be found possible to classify the decisions by their facts, and thus test still further the soundness of the principles proceeded upon.

Adverse claims against the assigned assets.

Several classes of such claims may be observed, as, *first*, a claim founded upon conversion of the creditor's money into specific property. Such was *Peters* v. *Bain* (1890), 133 U. S. 670, decided by the late Chief Justice WAITE, in the Circuit Court for the Eastern District of Virginia. The case involved the right of a receiver of a National Bank to claim from an assignee for the benefit of creditors such property as could be specifically proved as having been purchased with the Bank's money by the assignors in default of their duty as officers of the Bank, and also the right of the receiver to come in with the other creditors upon the balance of the fund. The Circuit Court allowed both claims of the receiver, and the Supreme Court, speaking by the present Chief Justice, affirmed these claims, adding, that "The doctrine of election rests upon the principle that he who seeks equity, must do it, and means, as the term is ordinarily used, that, where two inconsistent or alternative rights or claims are presented to the choice of a party, by a person who manifests the clear intention that he should not enjoy both, then he must accept or reject one or the other; and so, in other words, that one cannot take a benefit under an instrument and then repudiate it. It cannot be assumed that there was an intention on the part of Bain and Brother [the assignors], to dispose of that which was not theirs, or, even if they lawfully could, to cut the Bank off from participating in the property assigned, in the order [of preference] mentioned, by imposing the condition that the Bank should purchase its share by parting with its own property; nor does any equitable implication to that effect arise. The other creditors cannot claim compensation for being deprived of what did not belong to Bain and Brother, or of anything transferred in lieu thereof. There existed no equity on their part which could be held to estop the Bank from receiving what may come to it under the assignment, and in doing so, it will not occupy inconsistent positions.

That it sought to have the deed set aside, does not deprive it of its rights under it, upon the failure of its attack."

This decision must be distinguished from the case supposed by MITCHELL, J., *In re Van Norman* (*infra*, page 349), where objection to one provision was thought to prevent any taking under the assignment. The property here claimed in preference, was distinguishable from the other assets, and was so claimed.

Second, a claim founded upon disregard of the assignment by the debtor himself, as in the case of the *Appeal of Golden et al.* (1885), 110 Pa. 581, which arose from an unauthorized reconveyance by the assignee to the assignor, followed by a creditor's proceeding to have the trust created by the assignment enforced, notwithstanding the reassignment. The creditor's right was denied, because she had attached some of the assets after the assignment, and thereby (so it was argued), assented to the reassignment. The attachment had neither been prosecuted nor abandoned. But this contention was denied by STERRETT, J., delivering the opinion of the Court: "Under the circumstances disclosed by the record, the issuing and service of the execution attachment on the administrators of James E. Brown cannot be considered a waiver by the appellees [the creditor and her husband] of their right to insist on the enforcement of the trust. It was doubtless prompted by the unauthorized reconveyauce of the trust property, and resorted to for the purpose of acquiring a lien on the fund, in case the reassignment should be adjudged effective for the purpose of reinvesting the assignor with title to the trust property": Id. 587–8.

Jefferis' and *Yearsley's Appeals* (1859), 33 Pa. 39, cited in *Eppright* v. *Kauffman* (*infra*, page 355), should be observed to prevent an error. In this Pennsylvania case, the creditors under a prior assignment claimed a preference over creditors under a second assignment. Between the two assignments the debtor had become solvent, and had his property reassigned without paying these creditors now claiming a preference. This preference was denied, but no more. "As creditors, they can claim under the second assignment, but their rights must be measured by its provisions, and not by those of the first assignment. Claiming under one assignment, they cannot hold the assignee to duties prescribed by another and a hostile one": LOWRIE, J., Id. 40–1. So that the substance of this case is merely that creditors can claim on the fund only through the assignment; they cannot claim *from the assignee* in hostility to the assignment: *Geist's Appeal* (1884), 104 Pa. 355 and citations. That is, the creditors "have relinquished nothing in compensation of the benefits of the trust. They have not agreed to look to it for satisfaction of their claims. They have no title to the property assigned. They acquired a right oniy to enforce the duty undertaken by the assignees: MERCUR, J., *Wright et al.* v. *Wigton* (1877), 84 Pa. 163, 166 and citations.

Third, a claim may be prosecuted against the assigned assets, to obtain a priority not allowed by law under the assignment. In this class should be marshalled the New York case under annotation, and

a similar case in Minnesota, growing out of the failure of Van Norman Brothers, of Minneapolis, Minnesota. On the last day of December, 1883, J. H. Purdy & Co. issued an attachment out of the State court against the goods of Van Norman Brothers and a seizure was made. During the same day the defendants made an assignment to Charles C. Bennett, for the benefit of their creditors, and their assignee obtained a surrender of the possession which had been taken by the sheriff under the attachment. Also on the same day, another creditor, the firm of Lapp & Flershem, issued an attachment from the United States Circuit Court for District of Minnesota, and the Marshal proceeded to eject the assignee and take possession of the assets under his writ: MILLER, J., *Denny* v. *Bennett* (1888), 128 U. S. 489, 493, though this order of time seems doubtful: HARLAN, J., Id. 501. The assignee, upon application, was allowed to intervene in this latter attachment, but his motion to dissolve was refused: *Lapp* v. *Van Norman* (1884), 19 Fed. Repr. 406. It was not shown that the assignee did actually appear in this attachment, which was prosecuted to judgment and a sale of the attached property: MILLER, J., *Denny* v. *Bennett* (1888), 128 U. S. 489, 493, and MITCHELL, J., *In re Van Norman* (1889), 41 Minn. 494, 495. During the pendency of this attachment proceeding, the assignee brought a suit in the State Court against the United States Marshal, for the conversion of the attached goods. A verdict recovered against the Marshal, was sustained on appeal to the State Supreme Court: *Bennett* v. *Denny* (1885), 33 Minn. 530, and again on appeal to the Supreme Court of the United States: *Denny* v. *Bennett* (1888), 128 U. S. 489. Lapp & Flershem then paid the judgment against the Marshal and presented their claim to the assignee for allowance. The time for presenting their claim had not expired, and the estate had not been distributed, so that the question of time, which was so important in *Lovenberg* v. *Bank* (*infra*, page 352), did not arise. The assignee disallowed the claim, and in this was approved by the State District Court, but the State Supreme Court, speaking by MITCHELL, J., thought otherwise, saying: "It is not pretended that there is any provision in the insolvent law, debarring a creditor from proving his claim under such circumstances. Hence, if appellants are debarred, it must be on the ground that they had elected to pursue an inconsistent remedy, or to claim an inconsistent right. It was exclusively on this ground that the Court below bases its decision, and this is the only ground urged here by the respondent" [the assignee]: *In re Van Norman* (1889), 41 Minn. 494, 495–6.

The Court immediately went to the foundation of the controversy, by denying that the doctrine of election had any application to the facts of the case. "The appellants never, in fact, had any election of rights or remedies. This action was a mere futile attempt to assert a right which they never possessed, in which they were defeated and compelled to make restitution to the insolvent estate of what they had wrongfully withheld from it. If the appellants were claiming a benefit under one provision of the assignment, which was advantageous to them, but ob-

jecting to another provision as invalid, which was against their interest, we can see how the familiar principle might apply, that one who accepts a benefit under an instrument must adopt it as a whole, and cannot adopt the part beneficial to him and reject the rest [*supra*, page 347]. Or if the assignment had been voidable, at the election of the appellants, * * Or if the appellants still held the proceeds of the assigned property, and the suit against the Marshal was still pending and undecided, we can see why this might be good ground for disallowing their claim, under the familiar maxim that a 'party cannot blow hot and cold at the same time' [*infra*, page 351]. Or, again, if the appellants had prevailed in their [defense of the] suit against the Marshal, and then elected to retain the property, and rely on their attachment, rather than on the provision made for them in the assignment, this would doubtless have amounted to a waiver and disaffirmance of the trust." These *dicta* are valuable for comparison with the cases in the other States, where they have been uttered as points of decision, for the Court proceeded to declare, under limitation, what should be the true rule in all cases; that is:

"But none of the cases supposed, are at all analogous to the case at bar, which is simply one where a party has made a fruitless attempt to assert a right which he never possessed, and, being beaten, has made full restitution and compensation for the wrong which he committed. The rule is as undoubted as it is familiar, that where a party has inconsistent rights or remedies, he may claim or resort to one or the other, at his election, and that when once made, his election is irrevocable. But we think it is equally true that a mere attempt to pursue a remedy, or claim a right, to which a party is not entitled, and without obtaining any legal satisfaction therefrom, will not deprive him of the benefit of that which he had originally a right to resort to or claim; and this proposition, if sound, fully covers the case."

With reference to an objection to this principle, which was made a part of another judicial utterance (*infra*, page 350), the Court continued: "Considerable stress is laid upon the supposed injustice of allowing a creditor who contests the validity of the assignment, delays the distribution of the estate, and puts it to the expense of protracted litigation, when defeated, to come in and share in the benefit of the assignment equally with creditors who have all the time occupied a friendly attitude. In view of the policy and purposes of the insolvent law, it might have been advisable for the legislature to have incorporated in it some provision similar to that attempted to be applied in this case; but they have not done it, and the courts have no right to do it. And we know of no principle of law which imposes upon a party any other or greater penalty for attempting to assert a right to which he is not entitled, than the judgment for damages and costs awarded against him in the action": MITCHELL, J., *In re Van Norman* (1889), 41 Minn. 497. This is a clearer statement of the underlying principle of the New York decision here annotated, than made by that Court, and is certainly not answered by any of the cases to be considered later

(pages 351–352).

Jones v. *Tilton* (1885), 139 Mass. 418, has been cited (in *Drew Glass Co.* v. *Baldwin*) as establishing the impossibility of both attacking and claiming under the assignment; but this was an erroneous citation, as the creditors did not lose their claim upon the assets, though they endeavored to enforce an attachment issued subsequent to the assignment. Assent was given to the assignment after the attachment had been issued, and "such assent, if given before the commencement of an action, would debar the plaintiffs from making an attachment, and, being given afterwards, must defeat the attachment": C. ALLEN, J., page 420.

Of the cases which declare that a creditor cannot claim under an assignment after opposing or seeking to invalidate it, *Valentine et al.* v. *Decker, assignee* (1869), 43 Mo. 583, cited in *Eppright* v. *Kauffman*, (*infra*, page 355), was an instance where the plaintiffs had full notice of the assignment and the regularity of the proceedings under it, yet they attached the assets, and giving bond, ordered their sale by the Sheriff. The assignee then commenced suit on this attachment bond, and also refused to recognize the claim of the plaintiffs on the day appointed for the allowance of demands against the estate. The assignee was upheld in this action, WAGNER, J., delivering the opinion of the Supreme Court, that "although a deed be made for a party's benefit, his assent will be presumed, still this presumption is not absolute or conclusive, for the law will not force a party into a contract against his will. Therefore, he may, if he will, reject or repudiate an assignment; and he cannot claim a benefit under it, and at the same time attack it for fraud and attempt to destroy its validity. He must make his election, and either take under it or disclaim it." Passing to the safer ground of the particular case, the Court characterized the action of the plaintiffs thus: "If they succeed in their proceeding, they swallow up and appropriate the assets; but, if they fail, can they be permitted, after having sacrificed the goods, perhaps at a forced sale, and accumulated costs of their litigation, to come in on an equality with the other creditors for a *pro rata* share? The very proposition is monstrous, and its bare statement carries with it a sufficient refutation. If such a course is approbated, it will hold out inducements to creditors to attach, and, if they are successful, they will sweep the entire estate, to the total exclusion of all others; if not successful, they lose nothing, for they come in equally with the others. Such proceedings can meet with no favor in a court of justice": Id. 585. This reads savagely besides the temperate judgment of MITCHELL, J., or the more logical reasoning of GRAY, J., in the principle case (*supra*, pages 349, 343). This principle, however, was supposed to have been followed, in an "analogous" case, by MARTIN, C., in *Stoller et al.* v *Coates, assignee* (1885), 88 Mo. 514, 523, where a claim for a specific sum as a trust fund was refused because a dividend had been received. This was supposed to be an election which prevented any further claim for trust funds.

Valentine v. *Decker* was again cited in *The F. A. Drew Glass Co.* v. *Baldwin*, by the Kansas City Court of Appeals, June 6, 1887 (27

Mo. App. 44), where the attachment had issued the day before the assignment. The plaintiffs secured the allowance of their claim upon the assigned estate, and then undertook to press their attachment, but failed by the overruling of their demurrer to the assignee's interplea of the facts just mentioned. PHILLIPS, P. J., delivering the majority opinion, thought the analogy of a mortgage creditor valuable, as "It thus becomes manifest to my mind that the law contemplates no absurd results and contingencies in its administration. It will not permit a party to occupy such inconsistent positions in the prosecution of his rights. He ought not, with the judicial sanction, to be allowed to play with the other creditors the unequal game of 'heads I win, tails you lose.' [Compare the *dicta* of MITCHELL, J., and his subsequent remarks, *supra*, pages 348, 349.] He must either affirm the validity of the deed *in toto*, or stand out on his asserted prior, exclusive right. His attachment, in the very nature of the case, is antagonistic to the assignment. If it stands, there is nothing for the assignment to operate on. It is wholly unlike the instance of a prior mortgage or equitable lien. There the prior right is founded on contract—the assent of the debtor to create the lien": Id. 51.

ELLISON, J., dissenting, took the more reasonable though narrow ground, that the assignment had been made subject to the attachment, as this had issued the day before the assignment. Hence, even if the doctrine of election could apply, "the time had not yet arrived at which the defendant should be compelled to exercise that right. The doctrine of election, though sometimes applied at law, is of an equitable nature, principally exhibited in cases of wills, and rests, more or less, upon equitable principles, and it appears to me to be unjust and inequitable, to compel a prior attaching creditor, to elect between his attachment and the assignment, before the attachment has been passed upon": 27 Mo. App. 61.

This dissent was supported, among other citations, by the last resolution of the Court in *New England Bank* v. *Lewis et al.* (*infra*, page 356), where the action involved an attachment on the assigned goods. WILDE, J., delivering the opinion, confined himself to the case before him, and pointed out that "It is not, however, made a condition of the trust that the plaintiffs should discontinue their suit, nor does it appear that the defendants in that suit, either expected or wished it to be done. They insisted on their defense to the action, and eventually prevailed. Under these circumstances, the plaintiffs had a right to proceed to trial, with the view of saving themselves from costs. If they had prevailed in their action, and had then elected to rely on the attachment rather than on the provision made for them in the deed of trust, this, undoubtedly, would have amounted to a waiver and disaffirmance of the trust. But merely prosecuting the action to final judgment, cannot, we think, have any tendency to show a waiver of the trust": 8 Pick. (Mass.) 120–1.

Sampson v. *Shaw* (1885), 19 Mo. App. 274, was also decided upon the authority of *Valentine* v. *Decker*. There, a chattel mortgage had been made to secure certain

notes, and on the next day, the mortgagor executed an assignment for the benefit of his creditors. The mortgagee presented a claim to the assignee, with written notice "that the validity of said mortgage has not been tested in the courts, but will be, and should it be decided in favor of said Sampson [the mortgagee], the above notes will be paid in full without calling on any funds in the hands of the assignee; *otherwise* he presents said claims to be allowed and paid as other claims." This was held to be an election to claim under the mortgage, though the mortgagee would be, none the less, a creditor and a *cestui que trust*. This injustice is more especially to be observed in *Douglass* v. *Cissna* (1885), 17 Mo. App. 44, where a deed of assignment was immediately followed by an attachment issued under the erroneous idea that the deed was void because preferring one creditor. The Court concluded, on a motion for a reargument, that: "It is, therefore, with little grace that plaintiffs now complain, if their attachment is not maintained they will lose all, as they cannot be admitted to share in the distribution under the assignment after assailing it," citing *Valentiue* v. *Decker*, and adding "*Duos qui sequitur lepores, neutrum capit.*"

Lovenberg v. *Bank* (1887), 67 Texas 440, was a case where the principles of *Valentine* v. *Decker* were approved, though the exclusion of the attaching creditor was accomplished by strict construction of the time within which the claim could be proved. The circumstances were enough to excite the judicial ire, as the creditor forcibly removed the assets from the assignee's hands and vigorously contested under a chattel mortgage, void under assignment law, all legal efforts for their recovery by the assignee until finally compelled to hand over the value of the estate. After this litigation had terminated, claim was made upon the assets as by a consenting creditor. The Court were also influenced by *McKindley* v. *Nourse, assignee* (1885), 24 N. W. Repr. 750, where the Supreme Court of Iowa had denied a creditor the right to participate. The creditor had attempted to rescind a sale of goods to the assignor, and took them away from the assignee by a replevin. Eventually, the assignee won the replevin suit, and then the creditor sought to claim under the assignment, upon the plea that the commencement of the replevin was sufficient notice. This was denied by SEEVERS, J. "On the contrary, the plaintiff did not seek payment of the claim through the assignee or from the assignment. The validity of the assignment of the goods replevied was denied, and the plaintiff undertook to recover the whole value of the goods, instead of sharing with the other creditors. Having taken the chances, and, because of the choice made, failing to exhibit or file the claim within the time required by law, the plaintiff must abide the consequences."

The cases considered thus far under this subdivision were caused by the action of the creditors whose relation to the assignment was simply that of creditors. But there may be action taken against the assigned assets by a creditor who is also the trustee in the deed of assignment. Such was the circumstance of *Harrison &c.* v. *Mock et al.* (1846), 10 Ala. 185. It is necessary to observe the exact circum-

stances of the case, and their recital by ORMOND, J., in delivering the opinion of the Court: "The slaves Hagar, Aaron, Eliza, Nancy and her child, stand upon a different footing. They were sold by direction of the trustee, in June, 1842, nearly a year after the bill was filed [against the trustee, for an execution of the trust by paying the creditors], to satisfy judgments which he [the trustee] claimed the right to control, and at the sale he became himself the purchaser. This was a breach of his duty as trustee. The deed devoted the slaves and other property to the payment of all the creditors, in equal proportions, and he cannot be permitted to do an act beneficial to himself, and injurious to the rest of the creditors, whose interest he had undertaken by the acceptance of the trust to protect. The sale being made at his instance, and for a purpose not authorized by the deed, is voidable. [The Court continues, though the facts are otherwise stated in the report of the second appeal, in 16 Ala. 619, and also to support an application of the doctrine of election, by ENGLISH, C. J., in *Frierson, Exr. et al.* v. *Branch, Exr.* (1875), 30 Ark. 453, 461—] It does not appear that the executions under which the sale was made, were *liens* upon the slaves when the deed was executed; nor are we able to perceive that it would alter the case, if such was the fact. The deed provided for the payment of all the creditors ratably, if the property was not sufficient to pay all, as was the fact here, and by accepting the trust, the trustee consented that his own claim should be thus apportioned. He, in effect, waived his lien, and consented to come in as a general creditor, except so far as he was preferred by the deed. * * His purchase, therefore, of these slaves, must be considered to have been made by him in his character of trustee, and for the benefit of those concerned in the trust." This resolution was supported by citation of *Hawley* v. *Mancius* (1823), 7 Johns. Ch. (N. Y.) 584, and *Rogers* v. *Rogers* (1825), Hopk. Ch. (N. Y.) 523, and was followed when the case came before the State Supreme Court in 1849: 16 Ala. 616-24.

The former of these two citations was a similar case, before the distinguished Chancellor KENT, of New York. The judgment *lien*, however, was against real estate and prior to the assigment, but the principle involved was the same; that is, "to take out an execution upon the judgment against the property over which they are exercising a discretion and control as trustees, would be incompatible with a due discharge of the trust, and a manifest breach of it. They are bound, therefore, to seek for satisfaction of their judgment in the mode presented by the terms of the trust which they have accepted": 7 Johns. Ch. (N. Y.) 185. It would be a blunder to speak of trustees electing between their office and their personal advantage, in the sense of that doctrine of equity.

The second citation, by Judge ORMOND, was the case of an executor who was also a judgment creditor, and, of course, Chancellor SANDFORD applied the proper principle, in these words: "A trustee can give no advantage to himself, to the detriment of those for whom he holds his trust. * * * This doctrine is undoubted; and it has often

been enforced in this Court. It was fully examined by the late Chancellor [KENT], in the case of *Davoue* against *Fanning* (1816), 2 Johns. Ch. (N. Y.) 252. In that case, the late Chancellor traced the reasons of this doctrine and clearly displayed its foundations. [The present Chancellor then proceeds to sum these reasons of KENT in unmistakable language—] This rule is founded in the most salutary policy. It justly considers the trustee, as holding an office not for his own advantage, but for the benefit of the true owners of the subject held in trust. The objects of the rule are, to secure fidelity on the part of the trustee, and to preserve the interests of those whose rights are confided to his care. To effect these objects, equity does not inquire for fraud on the part of a trustee who attempts to purchase the subject of his trust; but it removes temptation, by declaring him incapable of making a purchase which shall bind those for whom he is entrusted; and it gives to them the option to vacate or affirm the purchase of their trustee, * * This rule imposes no hardship on the trustee: it prevents collision between his interest and his duty; and it precludes a difficult and uncertain inquiry into his motives. It is necessary for the security of those whose property is held in trust; and it produces practical and effectual justice": Hopk. Chan. 524-5.

Hence it is not the doctrine of election at all, which applies to creditors who assume the duties of assignees or trustees, but the much more general rule of fidelity to the purposes of the trust by the trusted fiduciary. As a consequence, the trustee was allowed to share *pro rata* with the other creditors: 16 Ala. 616, 623. And these things are remarkable, as this case was cited as authority for refusing a dividend to a creditor who was not the assignee, and who had merely pressed a prior attachment before claiming his dividend: per PHILIPS, P. J., in *Drew Glass Co.* v. *Baldwin* (*supra*, page 351). Of course, the case is not authority for such a ruling.

Reference is sometimes made in this connection, to the remarks of WASHINGTON, J., in *Prevost* v. *Gratz et al.* (1816), Peters C. C. 373, where he said that "A court of equity will not permit a person, acting as a trustee, to create within himself an interest opposite to that of his *cestui que trust* or principal. But this doctrine is inapplicable to the case of a fair *bona fide* creditor, who became so prior to the assumption of his fiduciary capacity. In such a case, he is entitled to claim the full amount of what was due from his *cestui que trust*, &c., and the latter has no right to inquire how much the former paid for it; so, too, the trustee &c. may pursue all legal remedies for enforcing payment of the debt, which would have been open to him if he had not become a trustee." This language was not used in or with regard to the class of cases here considered, and may be passed without further remark than that no hostile or destructive action towards the trust is supposed. Such rights as existed prior to the assignment, still remain, though their owner has become the assignee or trustee.

Fourth, the creditors may attempt to repudiate the assignment, as they did in *Jewett* v. *Woodward* (1831), 1 Edw. Chan. (N. Y.) 195. Vice-Chancellor MCCOWN thought

that "This seems to have been an unnecessary and rather a vexatious proceeding; but I do not perceive how the creditors, by so doing, deprived themselves of a right to come in and claim under the assignment, provided the proceedings proved unavailing, or they thought proper to abandon them. The doctrine of election does not apply to a case like the present, where the question is merely as to the remedy or mode of proceeding. If one remedy fails, the party may oftentimes resort to another. Nothing is more common than to leave a party to his bill in equity, after a fruitless attempt at law; and, *vice versa*. I am of opinion there has been no waiver or abandonment of the right to come in under the assignment and ask for a distribution of the trust funds." In the case under annotation, the Judge at the Special Term thought these sentiments to have a restricted application to cases when the creditors had abandoned their adverse proceedings (*supra*, page 341).

Attack on assets not assigned.

Eppright v. *Kauffman* (1886), 90 Mo. 25, was a case where the creditor claimed under the assignment, and also attacked what he supposed to be assets of the assignor which had not passed to the assignee. The case reached the State Supreme Court on account of the refusal of the assignee to pay the dividend awarded to the creditor, upon the mistaken impression that the creditor's adverse action had forfeited his right to the dividend. SHERWOOD, J., delivering the opinion of the Court, noticed *Valentine* v. *Decker* and *Jefferis' Appeal* (*supra*, pages 350, 347), and added: "But I have found no case going to the length of saying that where, as here, the claim of the creditor has passed *in rem judicatam*, his rights therein or thereto can be effected or overthrown in consequence of his subsequently recovering judgment for the amount of his allowed claim, and then attempting, by legal proceedings, to have that judgment satisfied out of what, at the time, were not considered as passing as assets into the hands of the assignee by reason of the assignment." The authority of this case cannot be extended beyond its facts, as the Court was unfortunate enough to add, that: "There is a wide difference, I take it, between a direct attack upon an assignment as for fraud, etc., and a case where a claim is presented and allowed before the assignee, and the claimant afterwards endeavors, by legal measures, to reach such assets as seemed to be beyond the reach of the assignee. There is certainly a distinction to be taken between direct attack and mere inadvertence": Id. 29. This language is weighty, as the decision has since been cited as authority for the proposition that the assignee's action in allowing or refusing a claim, is a judgment, conclusive and appealable from as other judgments, by SHERWOOD, J., *Nanson* v. *Jacob* (1887), 93 Mo. 331, 344, and NORTON, C. J., *Roan* v. *Winn*, Id. 503, 512.

Adverse proceedings against the debtor.

Such proceedings have been considered as affording no reason for excluding the creditor from participation in the assigned assets. Generally speaking, a judgment against the debtor, obtained even after the assignment, unless by collusion, will serve to fix the exact amount of the claim, and ought not

to diminish the rights of the creditor. To this, several objections have been raised: thus, *first*, it is said that the judgment has merged the claim, and so merged it that the right to prove under the assignment is cut off by reason of the judgment being a demand arising subsequent to the assignment. This contention was denied in *The Second National Bank of Richmond* v. *Townsend, assignee* (1888), 114 Ind. 534, where the Court below excluded a judgment, as well as the notes on which it was founded, from participation in the assets of an assigned estate. This was reversed, on appeal, because "Equity always refuses to permit a merger where it will work injustice. In this instance, this equitable principle should be applied. The act of the creditor, in reducing his claim to judgment, neither prejudiced the rights of any other creditor, nor interfered with the administration of the trust. The debt remains; the evidence is, it is true, changed into a new and higher form, but the appellant is still a creditor. * * * Equity looks through form to substance, and the substance to which it will here look, is that the appellant was a creditor when the assignment was made, and continued a creditor, although the form of the evidence of his debt was changed. * * * We hold that, although the notes were merged as a cause of action, an incidental right, such as the right to share in the trust funds in the hands of the assignee, was not even technically merged in the judgment. Incidental rights and equities of that nature were not litigated, and were not concluded by the judgment, and there can, therefore, be no merger": ELLIOTT, J., Id. 536–7.

Second, it was thought by the assignees, as early as 1829, in *New England Bank* v. *Lewis et al.*, 8 Pick. (Mass.) 113, 117, that the prosecution of the action was a rejection of the assignment, and, therefore, a claim presented to the assignees, subsequent to judgment, could be met with the old plea of a former recovery. This was denied, though the decision of the Supreme Judicial Court was closely confined to the facts before them, and these facts were peculiar in that the judgment set up in bar was adverse to the plaintiffs on the mere ground of suit before cause of action accrued: *New England Bank* v. *Lewis et al.* (1824), 2 Pick. (Mass.) 125. Hence the judgment was "no bar, either at law or in equity": WILDE, J., 8 Pick. (Mass.) 118.

New York Cases.

After the repudiation by the Court of Appeals, of any application of the doctrine of election to actions by creditors against the assigned assets, two cases in the inferior courts of New York become of little future value beyond their historical position as having preceded the final declaration of the law in that State. One of these cases is *Sternfeld* v. *Simonson* (1887), 44 Hun. (N. Y.) 429, from which O'BRIEN, J., in the Supreme Court stage of the principal case (*vide*, *supra*, page 341) drew the inference that if the action hostile to the assignment there taken, had been pending instead of fruitlessly ended, the unsuccessful creditor could not have claimed on the assigned estate and brought his action against the bondsmen of the assignee. But this inference is not properly drawn, as the case fell within the second of the two classes dis-

tinguished in this annotation (*supra*, page 346). "In fact, long before the issuing of the attachment, the plaintiffs had elected to proceed under the assignment, and their proceedings to examine the assignor and assignee, in regard to the property, and in respect to the amount of the bond which it would be proper for the assignee to give in the Court of Common Pleas, might have been a complete answer to their proceeding by attachment, upon the allegation that the assignment was made with intent to hinder, delay and defraud the creditors, as they had elected to assert rights under the assignment itself, and after having made such election, they could not attack it upon the ground of fraud": VAN BRUNT, P. J., 44 Hun. 432.

Iselin v. *Henlein* (1885), 16 Abb. New Cases (N. Y.) 73, probably caused the judgments in the court below in the principal case, though, curiously enough, it is not cited. This case was cited by VAN BRUNT, P. J., in *Sternfeld* v. *Simonson*, but merely to distinguish it. In this Iselin case, the defense was, in part, acquiescence in the assignment arising out of a compromise proposed after the assignment. This compromise was not carried out within the time fixed by the plaintiffs for giving their assent to it. After the expiration of the time so fixed, the plaintiffs, in January, 1884, issued an attachment against the assigned assets, on the ground of fraud, and their attachment was held to be valid: *Victor* v. *Henlein* (1885), 7. N. Y. Civ. Proc. 69. "The plaintiffs, in August, 1884, proved their debt and filed the same with the assignee. But they annexed to their proof, a statement that they did not thereby waive any rights they may have acquired under their attachment, and they added, 'nor do we recognize in any manner, the validity of said general assignment, unless the same is held to be valid and binding against us'": VAN VORST, J., 16 Abb. New Cases (N. Y.) 81. This action was similar to that of the creditor in *Sampson* v. *Shaw* (*supra*, page 352), and the New York Judge declared "the intentional qualification," was no admission of the validity of the assignment. The action, therefore, proceeded and the assignment was declared void. Judge VAN VORST apparently decided the case upon the absence of an equitable estoppel, the creditor not misleading and the assignee not being misled by the claim on the assets. And this seems far more reasonable than speaking of an election between contrary rights or remedies, when it is not the remedy chosen by the hostile creditor or the right asserted, but his acceptance of the assignment, that is the test. Those cases which proceed upon the test of an election, virtually put a premium upon fraudulent assignments by excluding an attacking creditor from all participation in the assets. Every creditor, in the jurisdictions where this principle prevails, is put to an "election" between proving or submitting to a fraud; and this because some creditors have failed to established a fraud which did not exist. Thus the greater evil is there preferred over the lesser.

The discussion of the difference between assent to an assignment before testing its validity, and assent after such legal scrutiny, will not now appear to rise from a mere question of priority of action or assent, but from a general principle

involved in the assent of the creditor to a voluntary assignment. This larger discussion involves also a consideration of the cases where assent has first been given, and then hostility undertaken. Such consideration must be postoned to a subsequent page of this magazine.

JOHN B. UHLE.

NOTE.—It is a curious fact that Adams, in his book on Equity, treats of the doctrine of election as if it was confined to wills. He says: "It has been stated as a general principle that the equity to enforce contracts made for value, is extended by parity of reasoning to cases where a benefit has been conferred as the consideration for an act, and knowingly accepted, although the party so accepting it may be bound by an actual contract, or by a condition of perfomance annexed to the gift. (*Edwards* v. *Grand Junction Railway*, 1 M. & C., 650; *Green* v. *Green*, 19 Ves. 665; 2 Meriv., 86; *Gretton* v. *Haward*, 1 Swanst. 409, 427.) The equity of election is analagous to this. It applies not to cases of contracts or of conditional gifts, but to those on which the donor of the interest by will has tacitly annexed a deposition to his bounty, which can only be effected by the donor's assent, *e. g.*, where a testator leaves a portion of his property to A, and by the same will disposes of property belonging to A." (*P. 92.*) There is not a word concerning any other kind of election.

Mr. Bispham in his work on Equity (Section 295) gives a clear statement of the doctrine of election. He says: "An election in equity is a choice which a party is compelled to make between the acceptance of a benefit under an instrument, and the retention of some property already his own, which is attempted to be disposed of in favor of a third party by virtue of the same instrument. The doctrine rests upon the principal that a person claiming under an instrument shall not interfere by title paramount, to prevent another part of the same instrument from having effect according to its construction; he cannot accept and reject the same instrument. *Streafield* v. *Streafield*, I Lead Cases, Eq. 333, and notes: *Codrington* v. *Lindsay*, L. R. Ch. App. 578; *Stephens* v. *Stephens*, 3 Drew, 697, 701; *Hall* v. *Hall*, I Bland, 130; *Clay* v. *Hart*, 7 Dana 1; *Brown* v. *Rickets*, 3 Johns Ch. 553; *Marriott* v. *Sam Badger*, 5 Maryl. 306; *Van Duyne* v. *Van Duyne*, 1 McCart, 49; *Gable* v. *Daub*, 4 Wright (Pa.) 217; *Reaves* v. *Garrett*, 34 Ala., 558; *Brown* v. *Pitney*, 39 Ill. 468. It is a doctrine which is principally exhibited in cases of wills; but it has been applied, also, to cases of voluntary deeds for value resting upon articles, to cases of contracts completely executed by conveyance and assignment. *Codrington* v. *Lindsay*, L. R. 8 Ch. App. 587; *Anderson* v. *Abbot*, 23 Beav. 457; *Brown* v. *Brown*, L. R. 2 Eq. 481; *Willoughby* v. *Middleton*, 2 Johns and H. 344.